

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

JOHN R. MARTIN,

Complainant,

vs.

DEPARTMENT OF CORRECTIONS,
STERLING CORRECTIONAL FACILITY,

Respondent.

Administrative Law Judge Robert W. Thompson, Jr. heard this matter on March 18, 2002. Hollyce Farrell, Assistant Attorney General, represented respondent. Complainant appeared in-person and was represented by Steven Furman, Attorney at Law.

MATTER APPEALED

Complainant appeals his disciplinary demotion. For the reasons set forth below, respondent's action is affirmed.

ISSUES

1. Whether respondent's action was arbitrary, capricious or contrary to rule or law;
2. Whether either party is entitled to an award of attorney fees and costs.

FINDINGS OF FACT

The Administrative Law Judge has considered the exhibits and the testimony, assessed the credibility of the witnesses and makes the following findings of fact, which were established by a preponderance of the evidence.

1. The Department of Corrections (DOC) has employed complainant, John R. Martin, for almost eleven years. He obtained the rank of Captain, and became a shift commander on February 1, 2001.
2. As shift commander for the graveyard shift at Sterling Correctional Facility (SCF), complainant controlled the entire facility. A shift commander, who leads by example, must be beyond reproach in terms of credibility.
3. A duty of a shift commander is to read the schedule at roll call at the beginning of the shift. On October 22, 23, and 24, 2001, complainant changed the work assignment of Sergeant Martin, his spouse, from Unit 5 to Unit 7. The previous week, Sergeant Martin had asked her supervisor, Lieutenant Yates, to change her schedule to Unit 7, and Yates denied the request.
4. Unit 7 is an administrative segregation unit. There is less work for a correctional officer to do in Unit 7 than there is in Unit 5.
5. The appropriate person to change Sergeant Martin's work assignment was Yates, her supervisor.
6. In early November, Yates notified Major Chavez, complainant's direct supervisor, that Sergeant Martin's schedule had been changed.

Chavez then asked complainant if he had made the schedule changes, and complainant responded that he had not done so, and that he thought that Yates had done it.

7. In mid-November 2001, Chavez heard from a captain that complainant had said that he had changed his wife's schedule in the latter part of October. On November 16, Chavez telephoned complainant at home to inquire of the truth of this assertion, and again complainant said that he did not do it. Chavez told complainant to come in and talk to him about it.
8. Via a November 19 e-mail to Chavez, complainant implicitly denied making the schedule changes.
9. At a November 26 person-to-person meeting, Chavez asked complainant to look him straight in the eyes and deny making the schedule changes and if he did, he would believe him. Straightforwardly, complainant responded, "No, I did not make those changes." Chavez stated that he was going to begin an investigation because there was evidence of complainant both changing his wife's schedule without authorization and lying about it.
10. On November 27, 2001, Chavez directed complainant to furnish him a written report by the end of the day. In this report to Chavez, complainant stated: "The accusation by Captain Mischiara that I had changed the roll call rosters for October 22, 23, and 24, 2001, by assigning my wife, Sergeant Deanna Martin, to work in Unit 7 instead of Unit 5 is untrue and totally false."
11. Associate Warden Mark Broaddus met with complainant and asked if he had changed the schedule of his wife. Complainant replied that he

did not think so and became angry and upset when Broaddus said he did not believe him.

12. At the conclusion of his shift on November 27, complainant asked for a meeting with Associate Warden Timothy Chase, who met with him at a Village Inn restaurant. Complainant told Chase that he had lied to his supervisor and needed advice on how to get out of it. Chase advised him to write a letter of confession and apology to the warden and volunteer for a demotion.
13. On November 28, 2001, complainant addressed a letter to Warden Robert Furlong, with copies to Associate Warden Broaddus and Major Chavez, in which he admitted that he had changed the schedule of his wife from Unit 5 to Unit 7 and apologized for his dishonesty.
14. Warden Furlong, the appointing authority, scheduled a predisciplinary meeting for December 13, 2001, to address the issues of complainant changing the work schedule of his spouse and not being truthful when asked about the schedule changes.
15. Furlong concluded that the act of changing a spouse's work schedule, though serious because of the impression of favoritism, did not warrant discipline. It was more significant to Furlong that complainant did not communicate the changes to his wife's supervisor, who had already denied the request, accused someone else of doing it, and lied repeatedly, including at least thrice to his immediate supervisor and in writing.
16. Furlong concluded that complainant violated DOC Administrative Regulation 1450-1, Staff Code of Conduct.

17. Complainant had a reputation for being less than truthful. About a year earlier, he had blamed a lieutenant for something that had been complainant's responsibility.
18. Complainant had received no previous corrective or disciplinary actions.
19. In deciding against a dismissal, Furlong took into account complainant's work history and the fact that he eventually told the truth, even though not until it appeared that his lies would be revealed.
20. With a determination that complainant's credibility was gone, and due to the serious and flagrant nature of his misconduct, Furlong imposed a disciplinary demotion, from Correctional Officer IV to Correctional Officer III, effective December 17, 2001.
21. John R. Martin filed a timely appeal of the disciplinary action on December 21, 2001.

DISCUSSION

I.

An appointing authority has the power to hire employees and evaluate job performance and to administer corrective and disciplinary actions. Rule R-1-6, 4 CCR 801. In the present matter, the appointing authority reasonably considered the evidence that he had before him and appropriately determined that a demotion by one rank was justified and in the best interests of the agency. The appointing authority did not abuse his discretion. See Rules R-6-5, R-6-6, R-6-8, R-6-9, R-6-10, R-6-11, and R-6-12, 4 CCR 801.

Substantial credible evidence supports the findings and conclusions of the appointing authority. Respondent's action was not arbitrary, capricious or contrary to rule or law. Conclusively, respondent proved by a preponderance of the evidence that there was just cause for the discipline that was imposed. See *Dep't of Institutions v. Kinchen*, 886 P. 2d 700 (Colo. 1994) (explaining role of state personnel system in employee discipline actions).

II.

Rule R-6-2, 4 CCR 801, which incorporates the concept of progressive discipline, provides that an appointing authority may properly impose disciplinary action, up to and including immediate termination, if it is determined that an employee's conduct was so flagrant or serious as to justify the action taken. Though not binding precedent, the reasoning of the court of appeals with respect to the definition of "flagrant or serious" in *Gonzales v. Dep't of Corrections*, Case No. 00CA1975 (Colo. App. 2001) (NSOP), is hereby adopted and applied to the issue in this case. In *Gonzales*, the court said at 5:

To determine whether conduct was serious or flagrant we look to the ordinary meaning of those words. "Serious" means important or significant. See Webster's Third New International Dictionary 2073 (1986). "Flagrant" is defined as an act that purposefully violates normal standards or good sense. See Webster's, *supra* at 862.

Here, the record establishes that complainant, a captain and shift commander, intentionally lied to his supervisor, a major, three times verbally and once in writing. He also implicitly lied in an e-mail to his supervisor. He lied to an associate warden. He tried to shift the blame to a lieutenant who he knew had not made the schedule changes, and he falsely accused the captain who had accused him. By inference, he told the truth only when it became apparent that his lies were not going to be successful.

Complainant purposefully violated normal standards as well as the dictates of good sense. This contravention of protocol supports a conclusion that complainant's misconduct was serious and flagrant and justified a reduction in rank.

III.

Section 24-50-125.5, C.R.S., provides that an award of attorney fees and costs is mandatory if it is found that the personnel action from which the proceeding arose was instituted or defended "frivolously, in bad faith, maliciously or as a means of harassment or was otherwise groundless." This record does not support any of those findings. Accordingly, this is not a proper case for a fee award. See Rule R-8-38, 4 CCR 801.

CONCLUSIONS OF LAW

1. Respondent's disciplinary action was not arbitrary, capricious or contrary to rule or law.
2. Neither party is entitled to an award of attorney fees and costs.

ORDER

Respondent's action is affirmed. Complainant's appeal is dismissed with prejudice.

DATED this ____ day
of April, 2002, at
Denver, Colorado.

Robert W. Thompson, Jr.
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. The notice of appeal must be received by the Board no later than the thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Rule R-8-58, 4 Code of Colo. Reg. 801. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ may be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is \$50.00 (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 45 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 894-2136.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double-spaced and on 8 1/2 inch by 11 inch paper only. Rule R-8-64, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R-8-66, 4 CCR 801. Requests for oral argument are seldom granted.

CERTIFICATE OF SERVICE

This is to certify that on the ____ day of April, 2002, I placed true copies of the foregoing INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE in the United States mail, postage prepaid, addressed as follows:

Steven M. Furman
Attorney at Law
526 Meeker Street
Fort Morgan, CO 80701

And through interagency mail, to:

Hollyce Farrell
Assistant Attorney General
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